United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1034

77-1034

TO BE ARGUED BY

HAL MEYERSON, ESQUIRE

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Bpls

UNITED STATES OF AMERICA,

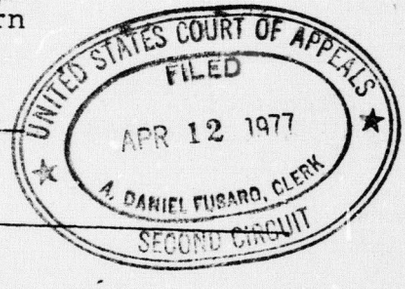
Plaintiff-Appellee,

vs.

DOMINICK LINARELLO,
PASQUALE PICCIRILLO
MARIA PICCIRILLO and
CARMINE MERCOGLIANO,

Defendant-Appellants.

On Appeal from the United States District Court for the Southern District of New York.



BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

The defendant-appellant, Dominick Linarello, appeals from a judgment of the United States District Court of New York, Eastern District of New York, (Judge Thomas Platt and a jury), adjudging the defendant guilty of the first count of the indictment, to wit: violating Title 18, United States Code, Section 922(a)(1), 923, 924 and 2, in that on or about the 13th day of May, 1975, and the 3rd day of September, 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendants Pasquale Piccirillo, Maria Piccirillo and Carmine Mercogliano, did knowlingly and unlawfully engage in the business of dealing in firearms and ammunition, the defendants Pasquale Piccirillo, Maria Piccirillo and Carmine Mercogliano not being licensed dealers in firearms and ammunition required by Title 18, United States Code, Section 923, and during the commission of this offense the above-named defendants were aided and abetted by Dominick Linarello, a federally licensed gun dealer, and the third count of the indictment, to wit: violating Title 18, United States Code, Sections 922(m) and 924 in that on or about and between the 5th day of April, 1976, and the 3rd day of September, 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendant Dominick Linarello, a federally licensed gun dealer, knowingly and unlawfully did fail to make appropriate entries and properly maintain

records which he is required to keep pursuant to Title 18, United States Code, Section 923 and the rules and regulations promulgated thereunder.

Defendant-appellant Linarello was acquitted of the second count of the indictment.

As a consequence of having been found guilty on counts one and three, the defendant-appellant was sentenced to serve a term of four years on each count and to pay a fine of $5000.00 on each count, the terms of imprisonment to run concurrently, ther terms of fines to run consecutively, thus making a total fine of $10,000.00.

The defendant-appellant is on bail pending this appeal.

STATEMENT OF FACTS

Agents Pitta and Zezima testified that they were introduced to Mr. and Mrs. Piccirillo by a confidential informer. Subsequently, they purchased a number of illegal weapons from a Mr. and Mrs. Piccirillo over a continuous period of time. The ususal mode of operation was for the agents to accompany Pasquale Piccirillo in one automobile to a street corner near the Fulton Gun Shop. They would give Pasquale money to obtain weapons. They would observe Pasquale entering and leaving the Fulton Gun Shop and return to the automobile. Pasquale would then produce the weapon for the agents. On a number of such occasions, subsequent to the transaction, the agents questioned him regarding where he obtained said weapons. His reply was that his source was Dominick Linarello. (Appendix pp. 6a, 7a, 8a, 9a, 10a and 11a.)

Linarello testified and denied that he was the source of said weapons. Agent Pitta further testified that he purchased a shotgun and a P.38 directly from Linarello. Only the sale of the shotgun was charged in Count Two. Linarello testified denying such charge. The jury acquitted on Count Two.

Agent Erickson testified that pursuant to a search warrant a search was executed of the Fulton Gun Shop and books and records of Dominick Linarello were seized. Linarello testified that the Government did not produce all his books and records in Court.

POINT ONE

THE TRIAL COURT ERRED BY THE ADMISSION OF OUT-OF-COURT DECLARATIONS OF CO-DEFENDANTS AGAINST DEFENDANT-APPELLANT LINARELLO BECAUSE LINARELLO WAS NEVER CHARGED AS A JOINT VENTURER.

Many out-of-court declarations of co-defendants Pasquale Piccirillo and Carmine Mercogliano were admitted as evidence against defendant-appellant Linarello.

Undercover Agents Pitta and Zezima testified that during the time that they were purchasing illegal weapons from Pasquale Piccirillo and Mrs. Piccirillo, both defendants made statements that Dominick Linarello was the source of the supply of illegal weapons. Defendant-appellant Linarello timely objected to the admission of these statements. Nevertheless, the statements were admitted as evidence.

Defendant-appellant Linarello urges that the admission of the aforesaid statements as evidence was error because they were hearsay. Although out-of-court declarations of a co-conspirator are admissible against fellow co-conspirators, there was no conspiracy charged in the indictment filed against the defendants.

Defendant-appellant Linarello does recognize that where there is a joint venture, out-of-court declarations of a co-conspirator are admissible against a defendant if made during and in furtherance of the common purposes of the joint venture, although a conspiracy is not alleged in the indictment. U.S. v. Alsondo, 486 F.2d 1339, 1347 (Second Cir., 1973); U.S. v. Weiser,

428 F.2d 932, 937 (Second Cir., 1969), cert. den. 402 U.S. 949; U.S. v. Granello, 365 F.2d 990, 995 (Second Cir., 1966), cert. den. 386 U.S. 995; U.S. v. Annunziato, 293 F.2d 373, 378 (Second Cir., 1961), cert. den. 368 U.S. 919. However, the aforesaid cases clearly state that an agreement between joint venturers with a common purpose is required. In the instant case, defendant-appellant Linarello is charged in Count One only as an aider and abettor; it was never proved that Linarello agreed to a joint venture with the common purpose of illegally distributing all the weapons admitted as evidence relating to Count One.

In U.S. v. Granello, supra, the Court stated that the admissibility of acts of a partner rests on basic principles of agency and not on the presence of a conspiracy count. In U.S. v. Pugliese, 153 F.2d 497, 500 (Second Cir., 1945), Judge Learned Hand quoted from Van Riper v. U.S., 13 F.2d 961, 967, as follows:

> "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a partnership in crime. What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all."

Judge Learned Hand also stated that what is required is "a joint undertaking" or "a common enterprise."

In the present case, even if Linarello did supply a few weapons to Pasquale Piccirillo or to Carmine Mercogliano, there was no proof of an agreement whereby Linarello knew that Mr. and Mrs. Piccirillo and Carmine Mercogliano were operating an unlawful business of dealing in firearms and ammunition and that

defendant-appellant intended to participate and further this business. Furthermore, even if it is found that there is circumstantial evidence that Linarello did know that his co-defendants would later resell the illegal weapons they purchased from him, there was no evidence that he had an interest or stake in whether or not they, in fact, did resell such weapons. Therefore, Linarello had no common purpose with his co-defendants such as to make them his agents and, therefore, be bound by their statements.

An analogous situation can be found when a thief sells his stolen goods to a "fence." If and when the fence later resells the stolen goods, the thief cannot be held as a joint venturer with said fence. The thief completes his sale; his goal is accomplished; he has no stake in the outcome with regards to whether the fence can resell those stolen goods or not. Likewise, for the sake of argument, even if Linarello did sell guns to the co-defendants, there was no proof whatsoever that Linarello had a stake in the outcome of their subsequent sales of the same guns. Without such a stake, there could be no agreement with a common purpose and no joint venture.

"(T)he gist of the offense (of conspiracy) remains the agreement." U.S. v. Borelli, 336 F.2d 376, 384 (Second Cir., 1964), cert. den. sub. nom. Cinquegrano v. U.S., 379 U.S. 960. It is therefore essential to determine what kind of an agreement or understanding exists as to each defendant. In other words, as to each defendant, it is essential to determine just what he

is promoting and making his own. U.S. v. Borelli, supra, 336 F.2d at 384, 385.

Thus, in order to allow as evidence hearsay declarations of a co-conspirator against defendant-appellant Linarello, the trial judge must find that there was an agreement with a common objective and that defendant-appellant joined this agreement and participated in carrying out its objective. "Nobody is liable in conspiracy except for a fair import of the concerted purpose or agreement as he understands it." U.S. v. Peoni, 100 F.2d 401, 403 (Second Cir., 1938). For these purposes, a joint venturer is to be considered a co-conspirator. This was the view of the State Judiciary Committee which wrote:

> "Rule 801(d)(2)(E) Hearsay Definitions: Statements Which Are Not Hearsay.
>
> The House approved the long-accepted rule that 'a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy' is not hearsay as it was submitted by the Supreme Court. While the rule refers to a co-conspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a co-conspirator for the purposes of this rule even though no conspiracy has been charged." U.S. v. Rinaldi, 393 F.2d 97, 99 (Second Cir.) cert. den. 393 U.S. 913 (1968); U.S. v. Spencer, 415 F.2d 1301, 1304 (Seventh Cir., 1969)."

It does not appear from the record that the trial judge made a finding that there was an agreement with a common purpose and that Linarello became a member of this agreement. Instead, it appears that he relied on the fact that he believed there was sufficient evidence to find that Linarello aided and abetted Mr. and Mrs. Piccirillo and Carmine Mercogliano's engaging in the

illegal business of dealing in firearms and ammunition. This is evident in the charge that the trial judge gave to the jury, as follows:

> "Now, there are certain statements that you may recall were made during the course of this trial by the Government agents and perhaps one or two others where there were arguments as to whether or not they were hearsay or whether they sould have been admissible.
>
> For example, the Government agents testified that the defendant Pasquale Piccirillo described to them certain acts which he alleged had been done by the defendant Linarello. My recollection is, and I caution you that it is your recollection not my recollection which controls, that, for example, one or more of the descriptions of acts by Mr. Linarello was given following Mr. Piccirillo's alleged trips alone into the Fulton Gun Shop and his re-emergence therefrom with certain of the guns which were received in evidence, namely, Exhibits 3, 4, 7, 8, 9 and 10. Now, ordinarily, this testimony by the Government agents with respect to the acts of Mr. Linarello would not be admissible against Mr. Linarello since the descriptions are hearsay, not having been made by Mr. Piccirillo in the presence of Mr. Linarello and the acts themselves were not committed in the presence of the Government witness or agent who testified.
>
> However, you may in any event consider the descriptions against the defendant Piccirillo and you may also consider the descriptions against the defendant Linarello on Count One if and only if you find beyond a reasonable doubt that at the time the acts so described were allegedly committed, the defendant Linarello was an aider and abettor, i.e., an active participant with the defendants Piccirillos in their alleged business as firearm or ammunition dealers without a license; otherwise, you must disregard such hearsay descriptions and the acts themselves entirely as against said defendant Linarello.
>
> Similiarly, with respect to the guns which Mr. Piccirillo allegedly brought of the gun shop by himself, namely Exhibits 3, 4, 7, 8, 9 and 10, while they may be considered in any event as evidence against Mr. Piccirillo, again they may only be received as evidence against defendant Linarello if you

find beyond a reasonable doubt that at the time they were allegedly acquired, the defendant Linarello was an aider or abettor, i.e. an active participant with the Piccirillos in their alleged business as firearm and ammunition dealers without a license; otherwise, you must disregard such guns entirely as against said defendant Linarello." (Appendix pp. 12a-14a)

In this charge, it is evident that the trial court confused being an aider or abettor (defined as an alleged business participant with the Piccirillos in their alleged business as firearm dealers) with being an individual who made an agreement to achieve the same common objective as the Piccirillos.

One can be an active participant and, therefore, liable as an aider and abettor without entering into an agreement with others with the same common objectives. A mere willing participation in acts with alleged co-conspirators, knowing in a general way that their intent was to break the law, has been held to be insufficient to establish a conspiracy. U.S. v. Purin, 486 F.2d 1363, (Second Cir., 1973), cert. den. 417 U.S. 930; U.S. v. Falcone, 109 F.2d 579 (Second Cir.) aff'd 311 U.S. 205; U.S. v. Peoni, 100 F.2d 401 (Second Cir., 1938). Yet the same acts could make an individual an aider and abettor.

It is respectfully submitted that the hearing statements of a co-conspirator should only have been admitted against defendant-appellant Linarello if he was charged as a joint venturer. However, since he was only charged as an aider and abettor and since the evidence demonstrated, at most, that he was an aider and abettor, said hearsay statements should have been excluded.

POINT TWO

THE TRIAL COURT ERRED BY THE ADMISSION OF WEAPONS, GOVERNMENT EXHIBITS NUMBERED 3, 4, 7, 8, 9 AND 10, AS AGAINST DEFENDANT-APPELLANT LINARELLO.

The trial court admitted weapons, Government Exhibits numbered 3, 4, 7, 8, 9 and 10, against the defendant-appellant Linarello on the same basis that he admitted the out-of-court declarations of co-conspirators. For the same reasons, these weapons should not have been admitted against Linarello.

POINT THREE

THE TRIAL COURT ERRED BY THE ADMISSION OF OUT-OF-COURT DECLARATIONS OF CO-DEFENDANTS AGAINST DEFENDANT-APPELLANT LINARELLO BECAUSE SAID DECLARATIONS WERE NOT MADE IN FURTHERANCE OF A JOINT VENTURE.

Even if defendant-appellant Linarello is found to be a joint venturer, the many statements of Piccirillo and Mercogliano that Linarello was their source for illegal weapons was not in furtherance of any common scheme or joint venture. Most, if not all, were uttered at times when Agents Pitta and Zezima had already purchased illegal weapons from Pasquale Piccirillo and were curious to know the source of where Piccirillo had obtained these weapons. Most of such comments occurred after Pasquale Piccirillo had been furnished with money by the agents, and had entered and returned from Fulton Gun Shop and returned to the agent's car with a weapon. His reply that Linarello was the source of the weapons was merely narrative and did not further any object of the conspiracy. It did not establish any further trust between the defendant and the undercover agents. The statements were not made in the interest of Linarello or even of the Piccirillos' who feared losing their profit (Appendix pp. 6a, 7a, 8a, 9a, 10a and 11a).

Essentially, the agents questioning as to who was the source and the replies thereto were only in furtherance of the agents' desire to locate the source; said questions and answers were not in furtherance or pursuant to the defendants' alleged joint venture.

As stated previously, even if Linarello did sell guns to

the co-defendants, Linarello had no stake in the outcome of what might later occur with respect to said guns. Therefore, anything said by the co-defendants after they had already purchased said guns from Linarello was not in furtherance of any joint venture conspiracy or common enterprise to which Linarello belonged.

POINT FOUR

THE TRIAL COURT ERRED IN ADMITTING HEARSAY DECLARATIONS OF CO-CONSPIRATORS BECAUSE PARTICIPATION OF DEFENDANT-APPELLANT LINARELLO WAS NOT ESTABLISHED BY FAIR PREPONDERANCE OF NONHEARSAY EVIDENCE.

Hearsay declarations of a co-conspirator may only be admitted as evidence if the Government proves by nonhearsay evidence that a conspiracy exists and that the individual defendant is a member of that conspiracy; all of which must be proved by a fair preponderance of the evidence. United States v. Geaney, 417 F.2d 116 (Second Cir., 1969).

In the instant case, the Government failed to meet its burden. The main nonhearsay evidence against the defendant was Agent Pitta's testimony that he purchased a shotgun directly from Linarello. However, said evidence was received by the trial court only as to Count Two and as a similar act as to Count Three. It was never admitted as to Count One. (Appendix pp. 23a-25a)

Furthermore, Linarello was acquitted of selling the shotgun because he was acquitted of Count Two. Therefore, this act cannot be held against him under the Geaney test.

The only other nonhearsay evidence against the defendant Linarello was:

1. Agent Pitta testified that at the time he purchased the aforesaid shotgun, that Pasquale Piccirillo introduced Linarello "as his source of supply;" (Appendix p. 20a)

2. On August 3rd, Agent Pitta testified that he believed a gun he had purchased from Pasquale was rusty; Pasquale said he obtained it from Dominick. Pitta went to Fulton Gun Shop and showed gun to Dominick, who

replied, "if he don't want it, he don't have to take it." (Appendix p. 21a)

3. On September 2nd, Pasquale was seen leaving the Fulton Gun Shop with Dominick Linarello. (Appendix p. 10a)

With respect to Item 1, it is undisputed that Pasquale Piccirillo could hardly speak English and that Agent Pitta could not speak Italian. Agent Pitta testified that he dealt with Piccarillo through Agent Zezima who spoke Italian. Piccirillo only spoke "broken English". (Appendix p. 22a)

As an example of their dealings, Pitta stated as follows:

"Q. What do I mean by broken English? When dealing with Pasquale Piccirillo, he would speak to Special Agent Zezima in Italian. I would be able to stop the conversation and ask Pasquale, 'how many guns, how many?' And he would go, 'one', and I would say, 'one gun?' He'd say 'one gun.' And this is the type of conversation I would have with Pasquale.

Q. And ----

A. Can I just stop for a minute? I am not finished yet.

Q. Go ahead. I have lots of time.

A. Also, when I would stop Special Agent Zezima and say, 'What did you say?', he would translate to me in Italian and then go back and tell him what he told me and he would nod, 'yes.'"

(Appendix p. 22a)

There is no indication that Zezima was present when Pitta was introduced to Linarello. Considering the extent of Piccirillo's English, this conversation should not be held against Linarello.

As to Item 2, this conversation only relates to one gun

late in the alleged conspiracy period. It should have no bearing, standing alone, of previous dealings.

As to Item 3, this is evidence only of association. The law is clear that association with a conspirator, without more, is insufficient to establish the requisite degree of participation in a conspiratorial venture; nor does it provide a sufficient basis for the admission of hearsay statements of alleged co-conspirators. U.S. v. Steinberg, 525 F.2d 1126, 1134, (Second Cir., 1975); U.S. v. Cirillo, 499 F.2d 872 (Second Cir., 1974), cert. den. 419 U.S. 1056.

There was no nonhearsay evidence linking defendant-appellant Linarello to Carmine Mercogliano. Therefore, it was error to allow hearsay statements of Mercogliano's as evidence against Linarello.

POINT FIVE

THE TRIAL COURT ERRED BY THE ADMISSION AS EVIDENCE SIMILAR ACTS AGAINST DEFENDANT-APPELLANT LINARELLO.

Agent Pitta testified that at the time he purchased a shotgun from the defendant-appellant Linarillo, as charged in Count Two of the Indictment, he also purchased a P.38 revolver from defendant-appellant Linarillo.

The trial court admitted the P.38 as evidence of a similar act in Count Two. He charged the jury at the time he admitted the P.38 as evidence. (Appendix pp. 17a, 18a and 19a), and again in his charge to the jury (Appendix pp. 14a, 15a and 16a), in substance, that the jury may use said evidence to prove knowledge, intent, identity, common scheme or plan or absence of mistake or accident or other innocent reason on the part of the defendant-appellant Linarello.

Rule 404(b) of the Federal Rules of Evidence states, as follows:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In the instant case against the defendant-appellant Linarillo, the offer of proof of similar acts does not fit within any of the aforesaid exceptions and hence is only being offered to prove the character of the defendant-appellant.

It is the defendant-appellant's position that the charges

of the indictment are false because he never participated in the alleged illegal acts.

The defendant-appellant does not claim that the witnesses do not know him. Hence, identity is not in issue.

The defendant-appellant does not claim to have transferred illegal weapons with an innocent purpose. His position is that he never transferred illegal weapons. Hence, intent is not in issue and knowledge s not in issue.

The only possible situation which the evidence of prior similar acts could fall within is that of "plan or design."

Cases which admit proof of other crimes as evidencing a plan or design from which it can be inferred that the defendant-appellant committed the crime in question fall into three somewhat overalpping situations. See Weinstein's Evidence, United States Rules §404(09) as follows.

(1) Same or common or connected or inseparable plan or scheme or transaction, or res gestae.

In this situation, evidence of other crimes is admitted where the other crimes is so integrally related to the crime charged in both time and place as to be "inseparably connected", and where evidence of the other crimes serves to establish the crime which is charged. See, e.g., Morgan v. United States, 335 F.2d 43, 45 (Tenth Cir.), cert. den. 384 U.S. 1025 (1966); Evenson v. U.S., 316 F.2d 94, 96 (Eighth Cir., 1963). Here the crimes are linked together as "part of the context of the crime" charged, U.S. v. Smith, 446 F.2d 200, 204 (Fourth Cir., 1971), or as "part

of the overall occurrence", Buatte v. U.S., 350 F.2d 389, 395 (Ninth Cir., 1965), cert. den. 385 U.S. 856 (1966).

Evidence of this sort is usually included so as to give a complete picture of the defendant's conduct at the time and place of the crime charged. McCormick states that evidence is introduced for this purpose, "[t]o complete the story of the crime on trial by proving its immediate context of happening near in time and place." McCormick Evidence, §157 (1954).

Where it appears that the other crime is so remote as not to be connected with the crime charged, evidence thereof is excluded. Anderson v. U.S., 170 U.S. 481, Torcia, Wharton's Criminal Evidence, §242.

The instant facts do not fall within this exception because the evidence of the similar act is not inextricably connected to the crime charged.

(2) Continuing place, scheme or conspiracy.

McCormick states that this exception is "to prove the existence of a larger continuing plan, scheme or conspiracy of which the present crime on trial is a part. McCormick Evidence, §157.

An example of this exception is United States v. Light, 394 F.2d 908, 912-913, (Second Cir., 1968). Light concerned a conspiracy to violate the Securities Act and mail and wire fraud statutes. The witness was allowed to testify that amounts were deposited in his brokerage account unknown to him and endorsed with his purported signature. The defendants moved to have the

testimony stricken because it imputed larceny and forgery. The testimony was held admissible for showing how illicit payments were concealed and was therefore "relevant to show the plan or device for carrying out the crime charged."

Applying cases under this exception presents the problem of the Court's evaluation of the scope of the scheme. Weinstein suggests the following:

> "In light of the policy of the rule to protect the defendant against unnecessary evidence, any balancing requires narrowing the scope of the provable scheme so it is no broader than is clearly required to give the trier an understanding of the evidence necessary to prove the crime charged." Weinstein's Evidence, United States Rules, §404(09).

Certainly the proof in the instant case gave the jury "an understanding of the evidence necessary to prove the crime charged." To admit further additional evidence was clearly prejudicial.

(3) Unique plan or scheme or pattern.

McCormick states that evidence may be admitted:

> "To prove other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused. Here much more is demanded than the more repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature." McCormick Evidence, §157.

In the instant case, there are no allegations of similar acts which are "unusual and distinctive as to be a signature."

Wigmore has stated that where the issue is whether the defendant committed the act at all, and the design or plan is to be proven by similar acts, the similar acts must prove a

pre-existing design, system, plan or scheme which is directed towards the doing of the crime charged as part of its consummation. 2 Wigmore Evidence, §304 (Third Edition, 1940).

In U.S. v. Bussey, 432 F.2d 1330 (D.C. Cir., 1970), the Court held that in a robbery case, wherein evidence of a prior robbery was introduced by a witness who claimed the defendant robbed him on another occasion from that charged in the indictment, the Court held it was error to receive such information where the conduct of the robber was not "so unusual and distinctive as to be like a signature." Hence, in the instant case, the proffered evidence of a similar act does not fall within any exception which would allow such evidence. Hence, it should be disallowed.

In United States v. Byrd, 352 F.2d 570, 575 (Second Cir., 1965), the Court held that evidence of prior crimes from the same witness who testified as to the crime charged in the indictment, given for the purpose of proving knowledge and intent, was largely cumulative and should not have been received. The Court stated:

> "From the quality of proof standpoint for proving knowledge and intent, its probative value was largely cumulative. The evidence came from the mouth of the same witness, Kaufman, who testified to the occurrences in the first two counts. If the jury believed his testimony as to those counts, the relating of the...incident added little, if anything, to a relevation of Byrd's state of mind. If they had disbelieved Kaufman's testimony about the first two counts, it is not very likely they would have believed his story about the Sandberg tax audit."

POINT SIX

THE TRIAL COURT ERRED BY RECEIVING EVIDENCE OF A SIMILAR ACT WHEN NO PRIOR NOTICE HAD BEEN GIVEN TO THE DEFENSE.

When evidence of a prior similar act was offered by the Government, there was no notice given to the defense.

That being so, the evidence of a similar act should not have been allowed against the defendant-appellant Linarell

POINT SEVEN

THE TRIAL COURT ERRED BY REFUSING TO DISMISS COUNT THREE OR, IN THE ALTERNATIVE, THE TRIAL COURT ERRED BY NOT CHARGING THE JURY THAT A LICENSED DEALER HAS UNTIL THE CLOSING OF THE FOLLOWING BUSINESS DAY TO RECORD TRANSACTIONS.

Defendant-appellant Linarello is charged in Count Three with knowingly and unlawfully failing to make appropriate entries and properly maintaining records which he is required to keep prusuant to Title 18, United States Code, Section 923, and the rules and regulations promulgated thereunder.

Mr. Erickson, testifying as an expert for the Government, stated that one of the aforesaid rules and regulations states that with regard to all transactions required to be recorded, a licensed dealer has until the close of the following business day to enter such transaction in his books and records. (Appendix p. 30a and 31a).

With regard to the firearms introduced as to Count Three which the Government claims were not recorded, there was no proof submitted by the Government which would indicate when any firearm required to be recorded was received by the defendant-appellant. Therefore, the Government failed in its burden of proof as to this count, and it should have been dismissed. At the very least, an instruction should have been given the jury as to this regulation so that the jury could decide whether or not Linarello had actually violated the statute as charged.

The trial court further erred by not dismissing Count

Three for insufficient evidence for the following reasons:

Regulation Section 178.121 requires records pertaining to firearm transactions to be retained on the licensed premises. In the instant case, the Government failed in its proof that it received all the books and records of Linarello.

The Government obtained the books of defendant-appellant Linarello by execution of a search warrant. Agent Erickson admitted in his testimony that he did not count the number of books taken and that the receipt was only marked with the phrase "books and records" without specification of number. (Appendix pp. 32a and 33a).

Furthermore, no chain of custody regarding the books and records was ever proved. Agent Erickson admitted that he had no personal knowledge or whether all the books seized were produced in Court when he testified that he could only "assume" the evidence was safeguarded. (Appendix p. 34a).

Mr. Linarello testified in this case that there were additional records which were not produced by the Government.

It is important to note that Linarello's books and records. It was the Government's burden to prove that what they produced in Court was all of the books and records. This is especially true in light of Agent Erickson's testimony that the books and records seized were kept in an "awful" manner. (Appendix p. 35a). It was his burden to insure that all books and records were collected and produced at trial.

POINT EIGHT

THE CHARGE TO THE JURY REGARDING DEFINITION OF A FIREARM WAS IN ERROR.

An issue arose during the trial regarding whether or not certain items were firearms as defined by the regulations which required recording. The trial judge erred by misreading the definition of a firearm from the regulations. The result was incomprehensible, as follows:

> "Now, the little references both in the statutes and during the course of the case to what a frame of references and it is defined in the regulations as that part of a firearm that provides housing, a hammer, breach or bolt and firing mechanism and usually is threaded at its forward position to receive its barrel." (Appendix p. 36a).

The pertinent regulations actually state that a firearm frame or receiver is "that part of a firearm which provides housing for the hammer, bolt or breach block and firing mechanism which is usually at its forward position to receive the barrel."

It is respectfully submitted that even a correct reading of the regulation is not sufficiently clear so that a jury could understand it. There was no definition of a hammer, bolt or breach block read to the jury. Therefore, since the charge to the jury was not correct on this point, the conviction on Count Three should be reversed.

POINT NINE

COUNT THREE WAS INCORRECTLY USED AS EVIDENCE TO CONVICT ON COUNT ONE.

In his summation, the prosecutor stated that the Government "did not charge Mr. Linarello with violation of the books and records because we wanted to get him for a technical violation." (Appendix p. 37a)

The reason the prosecutor gave was:

> "The Government indicted him on this count, ladies and gentlemen, because the fact that Dominick Linarello did not have those guns in his books and records, I submit to you, was proof that he was dealing it illegally. Why didn't he have them in his books and records? Because those were the guns he would deal illegally with in the same way Carmine Mercogliano and Maria and Pasquale Piccirillo. You can't deal illegally with people and put it in the books and records. That is why he was charged in that count, not for technical violations."

Since Count Three was used as evidence of Count One, if there was insufficient evidence as to Count Three, it unfairly prejudiced the jury with respect to Count One. Therefore, both counts should be reversed.

POINT TEN

THE TRIAL COURT WAS IN ERROR FOR REFUSING REQUEST OF LINARELLO FOR A MISTRIAL ON THE GROUNDS OF PREJUDICE FROM QUESTIONING THE CO-DEFENDANT.

Mr . Piccirillo testified on her own behalf. During the cross-examination, she was questioned extensively with regards to whether or not she had ever ordered anyone's legs broken. Defendant-appellant Linarello promptly requested a mistrial.

It is respectfully submitted that this line of questioning prejudiced defendant-appellant Linarello and that his motion for mistrial should have been granted.

POINT ELEVEN

DEFENDANT-APPELLANT JOINS HIS CO-DEFENDANTS IN ALL ARGUMENTS WHICH THEY RAISE.

Defendant-appellant joins his co-defendants in all arguments which they raise. Specifically, Linarello joins in the argument of Pasquale Piccirillo that the instant case should be reversed for failure of the Government to produce the confidential informant. In light of the fact that the Piccirillos' testified as to an entrapment defense and that the confidential informer was the source of their supply of guns, it was imperative for the Government to produce said informant to contradict said allegations. U.S. v. Bueno, 447 F.2d 903 (1971); U.S. v. Oquendo, 490 F.2d 161 (1974); U.S. v. Gomez-Rojas, 507 F.2d 1213 (1975). If Piccarillo was entitled to have the informer produced, then Linarello was also so entitled. Furthermore, if the case against Piccirillo is reversed, then Linarello could not have aided and abetted.

CONCLUSION

WHEREFORE, the judgment and sentence against the defendant-appellant Linarello should be reversed as to all counts.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Petitioner-Appellee,

-against-

DOMINICK LINARELLO, PASQUALE PICCIRILLO MARIA PICCIRILLO and CARMINE MERCOGLIANO,

Defendant-Appellants.

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Index Number 77-1034

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BRIGID E. WHELAN, being duly sworn, deposes and says:

That I am not a party to this action, am over 18 years of age; and reside at Woodside, New York.

That on the 12th day of April, 1977, I served the within Brief for the Defendant-Appellant and Appendix upon David G. Trager, United States Attorney, Eastern District of New York, at 225 Cadman Plaza East, Brooklyn, New York, attorney for the United States in this action, at the address designated for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed envelope, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me, this
12th day of April, 1977.

Harold Meyerson
Notary Public, State of NY
No. 31-4619066 Qual. in NY County
Comm. expires March 30, 1979

Brigid E. Whelan
BRIGID E. WHELAN